The particular issue of fact is whether the service agreements were a sham. That appears to me to be a question of fact which is proper to be decided by the Special Commissioners upon the evidence brought before them. The quantum of evidence necessary to prove this fact would no doubt fall on the respondent who is free to adduce whatever evidence he liked. It would be dangerous to lay down any formula or rule of universal application as to what amounts to sham agreements, for it must depend upon the particular circumstances of each case. On the basis of the presumption of law that the apparent state of affairs are real unless the contrary is proved (see *Ramkinkar Banerji* v. *Commissioner of Income Tax*[10]) it was contended for the taxpayer company that the service agreements were "real" unless the respondent proved them to the contrary. Therefore the burden of proving the service agreements are a sham is now upon the respondent. The evidence in rebuttal must be sufficiently cogent to persuade the tribunal of fact of the non-existence of the presumed fact. The rebutting evidence is to be considered on the merits of each particular case, and if it is believed, the presumption is displaced. But where there is evidence to consider, the decision of the Special Commissioners is final, even though the court might not, on the materials, have come to the same conclusion. In treating the question I can desire no more apt exposition of the law than what is contained in Lord Atkinson's speech in *Great Western Railway Co.* v. *Bater.*[11]

"Their (Commissioner's) determination of questions of pure fact are not to be disturbed, any more than are the findings of a jury, unless it should appear that there was no evidence before them upon which they, as reasonable men, could come to the conclusion to which they have come: and this, even though the Court of Review would on the evidence have come to a conclusion entirely different from theirs."

To displace the presumption the respondent led the following evidence: the drivers of the taxpayer company were not direct employees; they were independent contractors who hired out the taxis from the company on rentals; at all material times no relationship of master and servant ever existed between them; the taxi drivers were forced to sign certain documents, one of which was exhibit A1, the contents of which were never explained to them.

I should have thought that this is a case of a finding of fact that the service agreements are a sham. If that is so, then such finding is one which ought to be accepted and the court will not disturb it simply because it prefers a different conclusion.

Brief mention may be made regarding the contention of counsel that the finding of fact of the Special Commissioners *viz.*, the contracts of service were not valid contracts, being signed by the drivers under duress or undue influence, is *ex-facie* bad in law. This argument rested on the premise that the effect of a contract made as a result of duress or undue influence is to render the contract voidable and not void. In my opinion the matter can be disposed of shortly by saying that what is adumbrated before the Special Commissioners and understood by them is that the service agreements are a sham (not valid contracts). This construction appeared to me to place a consistent, rational and probable meaning on the whole of the phrase referred to when read in its context. It is the substance, not the form that must be looked at.

Reference was made to the powers of the Special Commissioners to direct the respondent to amend a notice of assessment which would have the effect of increasing the assessment beyond that specified in the notice. On this point it was suggested to us that this was nothing more than a matter of academic interest because the Special Commissioners are equipped with power to do so under paragraph 26 of the Fifth Schedule to the Income Tax Act, 1967 read with section 96(2) of the Act. Nothing of practical interest turns on this ground of appeal.

I would finally wind up by saying that the conclusions drawn by the Special Commissioners are on a view of the facts not erroneous in law. For these reasons I would dismiss this appeal with costs. I wish to state here that there are extensive grounds of appeal. But any omission to deal specifically with each one of them must not be taken to mean that I have not given the fullest consideration to it. Suffice it to say that in certain cases they overlapped; in others they are not worth a moment's glance.

Azmi L.P. and **Suffian C.J.** concurred.

Appeal dismissed.

TAN AH TING v. PUBLIC PROSECUTOR

[A.Cr.J. (Wan Suleiman F.J.) May 2, 1974]
[Kuala Lumpur — Selangor Criminal Appeal No. 146 of 1973]

Criminal Law and Procedure — Summary trial — Quantum of proof to be adduced before accused called upon to make defence — Expression "prima facie" case/evidence — Meaning of — Criminal Procedure Code (F.M.S. Cap. 6), s. 173(f).

The effect of section 173(f) of the Criminal Procedure Code is that it is the duty of a magistrate at the close of the case for the prosecution to determine whether or not the evidence tendered on behalf of the prosecution, if unrebutted, has established the case against the accused beyond all reasonable doubt.

Before calling upon the defendant to make his defence, the court has only to be satisfied that the prosecution has made out a *prima facie* case.

The meaning of the expression "*prima facie*" case/evidence generally accepted by the courts is where a party's evidence in support of an issue is so weighty that no reasonable man could help deciding the issue in his favour in the absence of further evidence.

Cases referred to:-

(1) *Soo Sing & Ors.* v. *Public Prosecutor* [1951] M.L.J. 143.
(2) *Sultan bin Rahmansa* v. *R.* [1955] M.L.J. 75.
(3) *Public Prosecutor* v. *Lee Ee Teong* [1953] M.L.J. 244.
(4) *Public Prosecutor* v. *R. Balasubramaniam* [1948] M.L.J. 119 @ p. 120.
(5) *Public Prosecutor* v. *Chin Yoke* [1940] M.L.J. Rep. 37 @ p. 38.

CRIMINAL APPEAL.

G. Joseph for the appellant.

Yaacob Ismail (Deputy Public Prosecutor) for the respondent.

Wan Suleiman F.J.: This is an appeal against conviction lodged by the defendant who was charged with driving without due care and attention, an offence punishable under section 36(1) of the Road Traffic Ordinance, 1958.

I need not go into details of the evidence adduced by witnesses for the prosecution. It would suffice to note that at the close of the case for the prosecution the learned magistrate held that "on the whole defence counsel had failed to cast any reasonable doubt upon the prosecution's case".

Had the learned magistrate left it at that, I would have dismissed the appeal since there appears to be evidence, if believed, which would support such a finding when he convicted the appellant who had elected to remain silent on the defence being called. However, he then embarked on an examination of the law as regards the quantum of proof which must be adduced before a Magistrate may call upon an accused person to make his defence at the close of the prosecution case in a summary trial. From this it would appear that he was uncertain as to the quantum of evidence which would justify the defence being called.

The relevant portion of his judgment, which is set out in extenso, reads as follows: —

"In order for the court to call for the defence, the court need not satisfy itself that the prosecution had proved its case beyond reasonable doubt. The court has to direct its mind to the question as to whether the prosecution had proved its case beyond reasonable doubt, only for the purpose of conviction. In order to call for the defence the court has only to consider whether the prosecution had made out a *prima facie* case."

Authorities.

1) *Cross on Evidence.*
2nd Edn. pp. 57 foot-note 4.

"Even in a criminal case the evidence sufficient to constitute a case to answer need, at most, be such as would *satisfy a reasonable tribunal on the balance of probability* (*R.* v. *Smith* (1865), 34 L.J.M.C. 153, cited in *Wilson* v. *Buttery* [1926] S.A.S.R. 150, which appears to be the most modern authority on the subject).

(I had italicized the words '... satisfy a reasonable tribunal on the balance of probability...').

2) *Practice Note, [1962] 1 All E.R. 448*

'L. Parker, C.J.': Those of us who sit in the Div. Ct. have the distinct impression that justices today are being persuaded all too often to uphold a submission of no case. In the result, this court has had on many occasions to send the case back to the justices for the hearing to be continued with inevitable delay and increased expenditure.

Without attempting to lay down any principle of law, we think that as a matter of practice justices should be guided by the following considerations.

A submission that there is no case to answer may properly be made and upheld:

(a) When there has been no evidence to prove an essential element in the alleged offence;

(b) when the evidence adduced by the prosecution has been so discredited as a result of cross-examination or is so manifestly unreliable that no reasonable tribunal could safely convict on it.

Apart from these two situations, a tribunal should not in general be called on to reach a decision as to conviction or acquittal until the whole of the evidence which either side wishes to tender has been placed before it. If, however, a submission is made that there is no case to answer, the decision should depend not so much on whether the adjudicating tribunal (if compelled to do so) would at that stage convict or acquit but on whether the evidence is such that a reasonable tribunal might convict. If a reasonable tribunal might convict on the evidence so far laid before it, there is a case to answer.

I had included this point as one of my grounds of judgment because there was a dispute between the defence counsel and P.O. as to whether in order for the court to call for the defence it must satisfy itself that the prosecution had proved its case beyond reasonable doubt; or the court need only to satisfy itself that the prosecution had made out a *prima facie* case. I held that the latter was the correct principle on the point:

In the present case I found that the prosecution had made out a *prima facie* case. I then called for the defence...."

The first passage from the 2nd Edition of *Cross* on Evidence, the learned magistrate failed to note, refers to a trial by a judge and jury, and cannot apply to a summary trial before a magistrate, in this country.

This passage appears in a foot-note to a section entitled "Judicial Control of the Jury" and refers to the quantum of evidence a judge sitting with a jury would have to look for to justify leaving the case to the jury. A judge acting under section 214(ii) of our Criminal Procedure Code, would likewise be justified in leaving the case to the jury only where there is evidence on which they might reasonably conclude the facts to be established. (See *Mallal's* Criminal Procedure 4th Edn. page 307 and authorities cited therein).

The 1962 *Practice Note* issued by the Divisional Court ([1962] 1 All E.R. 448), however, applies to summary trials before Justices in England.

The effect of section 173(f) of the Criminal Procedure Code is that it is the duty of a magistrate at the close of the case for the prosecution to determine whether or not the evidence tendered on behalf of the prosecution, if unrebutted, has established the case against the prisoner beyond all reasonable doubt — *Soo Sing & Ors.* v. *Public Prosecutor*.[1] (See also *Sultan bin Rahmansa* v. *Regina*;[2] *Public Prosecutor* v. *Lee Ee Teong*.[3])

Instead of the words "no case against the accused has been made out which, if unrebutted, would warrant his conviction" used in section 173(f), it is common for defence counsel to use the words "no case has been made out against the accused", or "no *prima facie* case has been made out against the accused".

The term "*prima facie* case" or "*prima facie* evidence" has suffered from lack of uniformity in usage. (See *Cross* on Evidence, 2nd Edition, pages 24, 25):

"*Prima facie* evidence: first sense ... where a party's evidence in support of an issue is sufficiently weighty to entitle a reasonable man to decide the issue in his favour, although, as a matter of common sense, he is not obliged to do so."

"*Prima facie* evidence: second sense (presumptive evidence) ... where a party's evidence in support of an issue is so weighty that no reasonable man could help deciding the issue in his favour in the absence of further evidence."

It is probably in the first sense that Callow J. used the term in *Public Prosecutor* v. *R. Balasubramaniam*.[4] Crown Counsel having submitted that a *prima facie* case had been made out, his Lordship said —

"I must go further and consider whether even if a *prima facie* case is shown, such element of doubt is removed so as to sustain a conviction if no more evidence is adduced."

It appears to me that the second sense is the proper meaning to accord to this expression, and is the meaning generally accepted by our courts. Gordon-Smith Ag. J.A. said in *Public Prosecutor* v. *Chin Yoke*,[5] adopting the definition given in *Mozley and Whiteley's* Law Dictionary (5th Ed.):

"A litigating party is said to have a *prima facie* case when the evidence in his favour is sufficiently strong for his opponent to be called on to answer it. A *prima facie* case, then, is one which is established by sufficient evidence, and can be overthrown only by rebutting evidence adduced by the other side."

When a court has ruled that a *prima facie* case has been made out by the prosecution at the close of its case and calls upon defendant to make his defence, and defendant chooses to remain silent, then and only then is the case against him proved beyond reasonable doubt.

"The decision to uphold or reject the submission ('of no case to meet') should not depend upon whether the adjudicating tribunal (if compelled to do so) would at that stage convict or acquit, but upon whether the evidence is such that a reasonable tribunal might convict."

states the 1962 *Practice Note* ([1962] 1 All E.R. 448) cited by the learned magistrate. Under section 137(f) of the Criminal Procedure Code, however, the trial court is clearly the tribunal to make such a decision, and must indeed regard itself to be a reasonable tribunal and not concern itself with how some other hypothetical reasonable tribunal might regard the evidence at that stage of proceedings. The words of the statutory provisions are clear.

The learned magistrate was correct in holding that before calling upon the defendant to make his defence, the court had only to be satisfied that the prosecution has made out a *prima facie* case.

However, I am left in doubt whether, in holding that prosecution had made out a *prima facie* case, he had because of his reliance on the passages from *Cross* on Evidence cited by him and the *Practice Note* of 1962, indeed determined, in the words of *Soo Sing's* case "whether or not the evidence tendered on behalf of the prosecution, if unrebutted, has established the case against the prisoner beyond all reasonable doubt".

The appeal is therefore allowed, the order of conviction set aside, and the case remitted to the court below for re-trial by another magistrate.

Appeal allowed.

Solicitors: *Lawrence & Joseph.*

MULLER & PHIPPS (M) SDN. BHD. v. PENANG PORT COMMISSION

[O.C.J. (Chang Min Tat J.) May 4, 1974]
[Penang — Civil Suit No. 287 of 1972]

Port Authority — Bailment — Breach of duty of bailors — Penang Port Commission By-laws 1957 — By-law No. 64.

Evidence — Invoice — Admissibility of.

The plaintiffs imported 3 packages of certain articles which were unloaded at the defendants' wharf. The cases were in apparent good order and condition. The goods were not opened or examined as the cases outwardly looked intact and untampered with. A copy of the bill of lading which did not indicate the nature or contents of the three cases was delivered to the defendants. The goods were stored in the defendant's godowns and after a period of 7 days the plaintiffs took delivery of the 3 packages. The agent of the plaintiffs thereupon noticed that one of the packages was too light. He then requested an outward survey which was done in the presence of this agent, representatives of the defendants and certain other officials. There were shortages discovered in the contents of 2 of the 3 packages. The plaintiffs could only ascertain their detailed loss when they received their invoice. The claim was for this loss, alleging failure on the part of the defendants to make full delivery implying that the goods were lost while in the custody of the defendants. The plaintiffs sought to prove their claim by means of the invoice as conclusive proof of the shipment.

Held: (1) following *Sin Tiew Bee* v. *Public Prosecutor*[1] the invoice was inadmissible in the way in which it was sought to put it in;

(2) even if it was admissible it was insufficient as the evidence of the packer, checker and exporter were also required.

Case referred to:-

(1) *Sin Tiew Bee* v. *Public Prosecutor* [1973] 2 M.L.J. 200 F.C.

CIVIL SUIT.

Mohideen Abdul Kader for the plaintiffs.

Lim Peng Siew for the defendants.

Chang Min Tat J.: In this action, the plaintiffs sued the defendants in respect of a consignment of lighters and flints which they alleged were delivered into the custody of the defendants and which in breach of their duty as bailees the defendants had so far failed to re-deliver to them.

The goods were said to be packed in three cases and shipped from London on board s.s. Cardiganshire. The three cases were unloaded at Penang Wharf on 20 November 1971. The unloading was supervised by a tally-clerk, as was the practice at that time, employed by a firm of stevedores acting on behalf of the shippers. This tally-clerk prepared a list of all the goods unloaded. Carbon copies were taken. One of these copies was given to an official of the defendants. This official's signature on another copy would constitute a receipt for the goods. In normal circumstances, the list would declare that the goods were landed in apparent good order and condition. Where the goods were not visible as when they were packed in cases, this declaration would refer to the outward condition of the cases. Short of opening up the cases, there could be no ascertainment of the quantity and condition of the goods actually contained in them. It was apparently not the custom to open packages which outwardly looked intact and untampered with. There